Chapter 18: Hearings on Termination of Parental Rights

18

In this chapter. . .

This chapter sets forth the applicable procedures, evidentiary standards, and statutory bases for terminating a parent's parental rights to a child. Sections 18.1–18.16 discuss the required procedures and evidentiary standards for hearings on termination of parental rights; Sections 18.17–18.31 discuss the provisions of MCL 712A.19b(3) that allow for termination of parental rights. Termination of a parent's rights may be considered at an initial disposition hearing or a hearing on a supplemental petition. In either situation, the petitioner must establish a statutory basis for termination of parental rights, and the court must determine whether termination is clearly not in the child's best interests. These two "steps" of a hearing are discussed in Sections 18.7–18.8. Sections 18.9–18.11 discuss the specific procedural requirements for termination of rights at an initial disposition hearing or at a hearing on a supplemental petition.

MCR 3.977 governs procedure at hearings on termination of parental rights. MCR 3.977(A)(1) states:

> "(1) This rule applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child, as defined by 25 USC 1901 et seq., are governed by MCR 3.980 in addition to this rule."

See Chapter 20 for the requirements in cases involving Indian children. See Chapter 11 for discussion of evidentiary issues.

18.1 When the Court May Consider a Request for Termination of Parental Rights

*See Section 4.2 for a summary of the statutory bases for personal jurisdiction.

The court cannot consider terminating a respondent-parent's parental rights and placing the child in the permanent custody of the court unless it has first established jurisdiction over the child pursuant to MCL 712A.2(b).* *In re Riffe,* 147 Mich App 658, 668 (1985), and *In re Franzel,* 24 Mich App 371, 373 (1970).

A. At the Initial Dispositional Hearing

*See Section 18.9, below, for the required procedures.

The court may enter an order terminating parental rights at the initial dispositional hearing pursuant to a request in an original or amended petition. MCL 712A.19b(1) and (4).*

B. When the Child Is in Foster Care or in the Custody of a Guardian

If parental rights were not terminated at the initial dispositional hearing and the child remains in foster care or in the custody of a guardian or limited guardian, the court may hold a hearing to decide whether to terminate parental rights following a dispositional review hearing or permanency planning hearing. The termination hearing is held after a supplemental petition is filed. MCL 712A.19b(1).*

*See Sections 18.10–18.11, below, for the required procedures.

C. When the Child Is Not in Placement

A child need not be placed in foster care before a court may entertain a petition requesting the termination of a respondent-parent's parental rights. *In re Marin,* 198 Mich App 560, 568 (1993). In *Marin,* the Court of Appeals concluded that although the trial court may be obligated under §19b(1) of the Juvenile Code to conduct a hearing on termination when the child remains in foster care, that section does not otherwise limit the conditions under which a petition for termination may be entertained. *Id.*

18.2 Petition Requirements

A request for termination of parental rights must be made in an original, amended, or supplemental petition. MCR 3.977(A)(2). Termination of parental rights at the initial dispositional hearing may be requested in an original or amended petition. MCR 3.977(E). Termination of parental rights in other circumstances may be requested in a supplemental petition. MCL 712A.19b(4) and MCR 3.977(F) and (G).

In *In re Pardee,* 190 Mich App 243, 247–50 (1991), the probate court dismissed a petition for termination of respondent's parental rights to his youngest daughter, which alleged that respondent was likely to sexually abuse this daughter at some time in the future. The petition was based in part on respondent's admission that he had sexually abused his oldest daughter five years earlier. The probate court concluded that petitioner failed to meet its burden of presenting clear and convincing evidence that respondent was likely to abuse his younger daughter at some time in the future. Three months later, the Department of Social Services (DSS, now the Family Independence Agency (FIA)) filed a second petition to terminate respondent's parental rights to his youngest daughter. The second petition alleged that respondent had sexually abused the youngest daughter after the dismissal of the first termination petition. The probate court took new testimony regarding these allegations and then granted the petition for termination. On appeal, respondent argued that the doctrine of res judicata barred the second proceeding. The Court of Appeals held that the second action was not barred in this case, as the petitioner did not seek termination

on the same grounds in both actions, and as new evidence and changed circumstances were presented in the second action.

18.3 Standing to File Petition Requesting Termination of Parental Rights

MCL 712A.19b(1) contains a list of persons who may file a petition requesting termination of parental rights:

> "(1) . . . the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, . . . the child, guardian, custodian, concerned person as defined in subsection (6), agency, or children's ombudsman as authorized in . . . MCL 722.927. . . ."

"Concerned person" is defined in MCL 712A.19b(6) as follows:

> "(6) As used in this section, 'concerned person' means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g)* and who has contacted the family independence agency, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section."

*MCL 712A.19b(3)(b) allows for termination of parental rights due to physical injury or physical or sexual abuse, and MCL 712A.19b(3)(g) allows for termination due to a failure to provide proper care or custody (neglect). See Sections 18.19 and 18.24, below.

In *In re Huisman,* 230 Mich App 372, 378–83 (1998), the Court of Appeals held that a custodial parent has standing to file a petition requesting termination of the noncustodial parent's parental rights under the Juvenile Code. After the parents divorced, the child's mother attempted to kill the child to prevent further contact with the father. The mother was sentenced to prison. The father remarried and, after an unsuccessful attempt to obtain a step-parent adoption under the Adoption Code, filed a termination petition under the Juvenile Code. The Court of Appeals interpreted "custodian" as used in MCL 712A.19b(1) to include a custodial parent. *Id.* at 380–81.

However, in *In re Swope,* 190 Mich App 478, 480–81 (1991), the Court of Appeals held that adoptive parents did not have standing to petition the court under §19b of the Juvenile Code to terminate their own parental rights to their adopted daughter. The Court concluded that parents cannot petition to terminate their own parental rights "because the statute was clearly enacted for the protection of children, rather than for the convenience of parents." *Id.* at 481.

The applicable court rule, MCR 3.977(A)(2), assigns the following persons standing to file a petition requesting termination of parental rights:

> "(2) Parental rights of the respondent over the child may not be terminated unless termination was requested in an original, amended, or supplemental petition by:
>
> (a) the agency,
>
> (b) the child,
>
> (c) the guardian, legal custodian, or representative of the child,
>
> (d) a concerned person as defined in MCL 712A.19b(6),
>
> (e) the state children's ombudsman, or
>
> (f) the prosecuting attorney, without regard to whether the prosecuting attorney is representing or acting as a legal consultant to the agency or any other party."

"Party" defined. The parties to a proceeding to terminate parental rights include the petitioner, child, respondent, and a parent, guardian, or legal custodian of a child. MCR 3.903(A)(18)(b). Only persons granted standing under a statute, court rule, or case law may participate in proceedings to terminate parental rights. *In re Foster,* 226 Mich App 348, 357–59 (1997).

18.4 "Respondent" Defined

MCR 3.977(B) contains the following definition of "respondent" for the purposes of a hearing on termination of parental rights:

> "(B) *Definition.* When used in this rule, unless the context otherwise indicates, 'respondent' includes
>
> (1) the natural or adoptive mother of the child;
>
> (2) the father of the child as defined by MCR 3.903(A)(7).*
>
> "'Respondent' does not include other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child."

*See Sections 5.1–5.2 for the definition of "father."

18.5 No Right to Jury Trial

*See Section 18.9, below (termination at initial dispositional hearing).

There is no right to a jury during hearings to determine whether to terminate parental rights. MCR 3.977(A)(3). However, a party is entitled to a jury during the "adjudicative phase" of proceedings involving a request for termination of parental rights made in an original or amended petition (i.e., at an initial disposition hearing).*

18.6 Suspension of Parenting Time

MCL 712A.19b(4) states in part:

> "(4) . . . If a petition to terminate parental rights to a child is filed, parenting time for a parent who is a subject of the petition is automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended under this subsection establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate."

See also MCR 3.977(D), which contains substantially similar language.

18.7 Standard and Burden of Proof Required to Establish Statutory Basis for Termination

There must be clear and convincing evidence that one or more of the statutory criteria allowing for termination of parental rights have been met. MCR 3.977(E)(3), (F)(1)(b), and (G)(3), and MCL 712A.19b(3). The "clear and convincing evidence" standard is necessary to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution. *Santosky v Kramer,* 455 US 745, 767 (1982).

The Court of Appeals in *Kefgen v Davidson*, 241 Mich App 611, 625 (2000), defined "clear and convincing evidence" as follows:

> "'Clear and convincing evidence is defined as evidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' . . . Evidence may be uncontroverted, and yet not be "clear and convincing." .

> . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted.' *In re Martin*, 450 Mich. 204, 227; 538 N.W.2d 399 (1995), quoting *In re Jobes*, 108 N.J. 394, 407-408; 529 A.2d 434 (1987); see *People v Williams*, 228 Mich. App. 546, 557-558; 580 N.W.2d 438 (1998).'"

The party seeking to terminate parental rights has the burden of proving that a statutory criterion for termination has been fulfilled. MCR 3.977(A)(3). The party seeking termination must prove parental unfitness according to the statutory standards in §19b of the Juvenile Code; termination of parental rights is improper where it has only been shown that the child would be "better off" in foster care. *Fritts v Krugh,* 354 Mich 97, 115 (1958), and *In re Atkins,* 112 Mich App 528, 541 (1982).

In *In re Bedwell,* 160 Mich App 168 (1987), the trial court failed to specify a statutory basis for termination in its final order. Instead, the court's order provided that, based upon "stipulation of the parties," termination of the respondent's parental rights would not take effect for six months, and that the order would be set aside if the respondent satisfied 11 conditions in her Case Service Plan. *Id.* at 171. Respondent failed to satisfy six of the conditions, and the court entered the order terminating her parental rights. On appeal, the Court of Appeals held that this procedure placed undue emphasis on compliance with the Case Service Plan. Noncompliance with the conditions of the court for reunification of the family may be considered but is not determinative of whether termination should occur. *Id.* at 176.* The Court stated that although a similar procedure was used by the trial court but not criticized in *In re Adrianson,* 105 Mich App 300, 319 (1981), in that case the petitioner had proven by clear and convincing evidence that parental rights should be terminated under the statute. *Id.* at 177.

*See also Section 17.5.

18.8 Requirements for the "Best Interest" Step

MCL 712A.19b(5) states as follows:

> "(5) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests."

MCR 3.977(E)(3), (F)(1)(b), and (G)(3) all contain substantially similar language.

Respondent-parent does not have burden of production. A respondent-parent does not have the burden of producing evidence that termination of his or her parental rights is clearly not in the child's best interests. "[U]nder subsection 19b(5), the court may consider evidence introduced by any party when determining whether termination is clearly not in a child's best interest. Further, even where no best interest evidence is offered after a ground for termination has been established, we hold that subsection 19b(5) permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." *In re Trejo Minors,* 462 Mich 341, 353 (2000), overruling *In re Hall-Smith,* 222 Mich App 470, 472–73 (1997) (footnote omitted). In *Trejo,* the Court concluded that the evidence supported termination, where the respondent testified during the "best interests phase" that she would "gradually introduce" the three children to her new husband and then move the children into their new home. *Trejo, supra* at 363–65. The Court also upheld the constitutionality of subsection 19b(5), finding that a parent no longer has a right to custody and control of a child once a statutory ground for termination of parental rights has been established, and that subsection 19b(5) provides an opportunity to reinstate those rights even though a parent may not insist on it. *Trejo, supra* at 354–56.

Rules of evidence do not apply. In determining whether termination of parental rights is clearly not in the best interests of the child, all relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. The respondent and the petitioner must be afforded an opportunity to examine and controvert written reports received and must be allowed to cross-examine the individuals who made the reports when those individuals are reasonably available. MCR 3.977(E)(3), (F)(1)(b), and (G)(2).*

*The parties may challenge the weight to be given written reports, especially since such reports generally contain "hearsay within hearsay." See Sections 11.5(F) and (G).

> **Note:** It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

Defining a child's best interests. The Juvenile Code does not contain a definition of the "best interests of the child." Although not directly applicable to child protective proceedings, the Child Custody Act and Adoption Code contain lists of factors that courts use to determine a child's best interests in custody and adoption proceedings. The factors applicable to child custody cases may be found at MCL 722.23:

> "As used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute."

The factors contained in the Adoption Code are substantially similar to those in the Child Custody Act. See MCL 710.22(f).

In child protective proceedings, it is inappropriate to compare a child's parent's home or abilities to a relative's or foster parent's home or abilities. In making the "best interests" determination under MCL 712A.19b(5), the court need not make findings with regard to the "best-interest factors" under the Child Custody Act. Examination of these factors may be appropriate in certain cases, however. *In re JS & SM,* 231 Mich App 92, 99–103 (1998), overruled on other grounds 462 Mich 341 (2000).

Court is not required to place child with relatives. If it is in the best interests of the child, the court may terminate parental rights instead of placing the child with relatives. See the following cases:

- *In re IEM,* 233 Mich App 438, 450–54 (1999) (trial court did not err by failing to consider, prior to termination, placement of the respondent-mother and the child with the respondent's mother. Although the child's mother may be a fit custodian of the child following termination, that determination must be made independently of the decision to terminate parental rights);
- *In re McIntyre,* 192 Mich App 47, 52–53 (1991) (trial court properly considered the best interests of the children in terminating parental rights rather than placing the children with an uncle, even though the uncle made considerable efforts to plan for the children);
- *In re Sterling,* 162 Mich App 328, 341–42 (1987) (trial court did not err in terminating parental rights rather than continuing its temporary wardship of the child and placing the child with an aunt, where a previous placement with the aunt had failed);
- *In re Futch,* 144 Mich App 163, 168–70 (1984) (trial court did not err in terminating parental rights despite the availability of relatives with whom to place the child, where those relatives failed to intervene when they became aware of the physical abuse of the child); and
- *In re Brown,* 139 Mich App 17, 20–21 (1984) (trial court did not err in refusing to place the child with maternal grandmother rather than terminating parental rights, where the respondent-mother, whose psychotic episodes resulted in physical abuse of the child, would have been residing in the same house as the child).

18.9 Termination of Parental Rights at Initial Dispositional Hearing

Certain serious circumstances require the FIA to file a petition requesting termination of parental rights at the initial disposition hearing. See MCL 722.638(1)–(2), discussed in Section 2.22. In all other cases, the petitioner

has discretion to request termination of parental rights at the initial disposition hearing.

MCL 712A.19b(4) allows a court to enter an order terminating parental rights at an initial disposition hearing. MCR 3.977(E) sets forth the procedural requirements for termination of parental rights at an initial disposition hearing. That rule states:

> "(E) *Termination of Parental Rights at the Initial Disposition.* The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
>
> > (1) the original, or amended, petition contains a request for termination;
> >
> > (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
> >
> > (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
> >
> > (a) are true, and
> >
> > (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);*
>
> "unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child."

*Termination of parental rights under §19b(3)(c) may not be requested at an initial disposition hearing because, under that statute, 182 days must elapse following an initial disposition order. See Section 18.20, below.

18.10 Termination of Parental Rights on the Basis of New or Different Circumstances

The court may terminate parental rights after a supplemental petition has been filed on the basis of one or more circumstances that are new or different from the offense for which the court took jurisdiction. MCR 3.977(F) states as follows:

> "(F) *Termination of Parental Rights on the Basis of Different Circumstances.* The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.
>
> "(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if
>
> > (a) the supplemental petition for termination of parental rights contains a request for termination;
> >
> > (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:
> >
> > (i) are true; and
> >
> > (ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), (m), or (n);*
>
> "unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child."

*Termination of parental rights under §19b(3)(c)(*i*) may not be requested under this court rule because that statutory provision requires termination to be based on the same circumstances that led to adjudication. Termination under §19b(3)(h) is improper under this court rule because that statutory provision allows for termination based on a parent's imprisonment.

Time requirement for hearing on supplemental petition. MCR 3.977(F)(2) states:

> "(2) *Time for Hearing on Petition.* The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days."

A court has discretion to order a continuance of a hearing on termination of parental rights; dismissal of a supplemental petition is not a proper remedy for failing to adhere to the applicable time requirements. *In re Jackson,* 199 Mich App 22, 28–29 (1993). Furthermore, a court may extend the time for hearing beyond the additional 21 days allowed under the court rule. *In re King,* 186 Mich App 458, 461 (1990).

Legally admissible evidence required to establish factual basis for parental unfitness. Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. MCR 3.977(F)(1)(b).

When termination is sought on the basis of allegations in an original petition or on the basis of changed circumstances, legally admissible evidence must be used to establish that the parent's conduct meets one or more of the statutory criteria for termination of parental rights. MCR 3.977(E)(3) and (F)(1)(b). However, if termination of parental rights is sought on the same grounds that allowed the court to take jurisdiction of the child, all relevant and material evidence may be admitted to determine whether one or more of the statutory criteria have been fulfilled. MCR 3.977(G)(2)–(3). The distinction between these two situations was succinctly stated by the Court of Appeals in *In re Snyder,* 223 Mich App 85, 89–90 (1997):*

*Note that the *Snyder* Court construed court rules in effect prior to 2003.

> "But the court rules distinguish two situations: (1) the basis for the court taking jurisdiction of a child is related to the basis for seeking termination of parental rights, and (2) the basis for the court taking jurisdiction of a child is unrelated to the basis for seeking termination of parental rights. In the first situation, legally admissible evidence (under the rules normally used in civil proceedings) will already have been adduced at the adjudicative-phase trial, and thus *supplemental* proofs, which are presented on a background of such legally admissible evidence, need not be admissible under the Michigan Rules of Evidence. MCR 5.974(D)(3) (termination sought in initial petition); MCR 5.974(F)(2) (termination based on grounds related to those established in initial petition). This will almost always be the case when termination is sought in the original petition.
>
> "In the second situation, the basis for terminating parental rights lacks this background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered. MCR 5.974(E)(1). This may or may not be the case when termination is sought after the filing of the initial petition, depending on the grounds for termination alleged."

In *In re Gilliam,* 241 Mich App 133 (2000), the petitioner alleged that the children suffered smoke inhalation when a fire broke out in respondent-mother's apartment, where the children had been left alone. The petition also alleged that respondent-father, who was separated from respondent-

mother at the time of the fire, did not have a suitable home for the children. A supplemental petition requesting termination of respondent-father's parental rights was later filed, alleging that he had tested positive for drug use on several occasions and had failed to attend parenting classes and drug abuse therapy sessions. *Id.* at 135–36. Only inadmissible hearsay was presented at the termination hearing to establish these new and different allegations. *Id.* at 137. The Court of Appeals reversed and remanded the case to the trial court. Under previous MCR 5.974(E)(1) and *Snyder, supra,* the new and different allegations were required to be proven by legally admissible evidence. *Gilliam, supra* at 137.

18.11 Termination of Parental Rights in Other Cases

*§19b(4) allows for termination of parental rights at an initial disposition hearing. See Section 18.9, above.

MCL 712A.19b(1) states in part as follows:

> "(1) Except as provided in subsection (4),* if a child remains in foster care in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or if a child remains in the custody of a guardian or limited guardian, . . . the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court."

The applicable court rule, MCR 3.977(G), states as follows:

> "(G) *Termination of Parental Rights; Other.* If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).
>
> **"(1) Time.**
>
> "(a) *Filing Petition.* The supplemental petition for termination of parental rights may be filed at any time

after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first.

"(b) *Hearing on Petition.* The hearing on a supplemental petition for termination of parental rights under this subrule must be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

"(2) *Evidence.* The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports so received and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

"(3) *Order.* The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds on the basis of clear and convincing evidence admitted pursuant to subrule (G)(2) that one or more facts alleged in the petition

(a) are true, and

(b) come within MCL 712A.19b(3),

"unless the court finds by clear and convincing evidence that termination of parental rights to the child is not in the best interest of the child."

Time requirement for hearing on supplemental petition. A court has discretion to order a continuance of a hearing on termination of parental rights; dismissal of a supplemental petition is not a proper remedy for failing to adhere to the applicable time requirements. *In re Jackson,* 199 Mich App 22, 28–29 (1993). Furthermore, a court may extend the time for hearing beyond the additional 21 days allowed under the court rule. *In re King,* 186 Mich App 458, 461 (1990).

18.12 Required Findings by the Court

MCR 3.977(H) sets forth the requirements for a court's findings following a hearing on termination of parental rights. That rule states:

> **"(H) Findings.**
>
> "(1) *General.* The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. If the court does not issue a decision on the record following hearing, it shall file its decision within 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights.
>
> "(2) *Denial of Termination.* If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.
>
> "(3) *Order of Termination.* An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order."

MCL 712A.19b(1) also contains requirements for a court's findings and order following a hearing on termination of parental rights:

> "The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated. The court shall issue an opinion or order regarding a petition for termination of parental rights within 70 days after the commencement of the initial hearing on the petition. However, the court's failure to issue an opinion within 70 days does not dismiss the petition."

Violation of time requirements. A violation of the requirement in former MCR 5.974(G)(1) and current MCR 3.977(H)(1) that the trial court file a written decision no later than 70 days after commencement of the termination hearing does not require reversal unless a failure to reverse would be inconsistent with substantial justice. *In re TC,* 251 Mich App 368, 371 (2002). In *TC,* the trial court failed to comply with the 70-day requirement in former MCR 5.974(G)(1) because it took its ultimate decision under advisement at the close of the termination hearing. The trial court issued its written opinion terminating the rights to one of the children involved over 11 months after commencement of the termination hearing.

In re TC, supra at 369, n 1. The Court of Appeals noted that MCL 712A.19b(1) explicitly states that "failure to issue an opinion within 70 days does not dismiss the petition" but rejected respondent's argument that the omission of such language from former MCR 5.974(G)(1) signalled the Michigan Supreme Court's rejection of the statute's lack of a sanction. *In re TC, supra* at 370. Instead, consistent with previous decisions finding that violations of other time limits did not require reversal, the Court of Appeals concluded that it would be illogical to introduce further delay of the proceedings to remedy delay. Pursuant to former MCR 5.902(A) (and current MCR 3.902(A)), MCR 2.613(A) governs limitations on corrections of error. That rule states:

> "(A) *Harmless Error.* An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." *In re TC, supra* at 371.

Termination of rights of unidentified father. If no legal father has been established, a court may include in its order a provision that terminates the rights of the child's mother and sole legal parent, and the rights of the child's biological father, including any rights "Richard Roe" may have.

18.13 Required Advice of Rights

Immediately after entering an order terminating parental rights, the court must advise the respondent-parent orally or in writing of his or her rights. MCR 3.977(I) states:

> **"(I) Respondent's Rights Following Termination.**
>
> "(1) *Advice.* Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:
>
> (a) Respondent is entitled to appellate review of the order.
>
> (b) If respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.*

*See Section 7.4.

(c) A request for the assistance of an attorney must be made within 21 days after notice of the order is given. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d) Respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27.*

*See Warner, *Adoption Proceedings Benchbook* (MJI, 2003), Section 4.6(G).

"(2) *Appointment of Attorney.* If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall enter an order appointing an attorney. In the interest of justice, the court may appoint an attorney where the request is filed untimely.

"(3) *Transcripts.* If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court may, on motion or its own initiative, order transcripts prepared at public expense."

18.14 Voluntary Termination of Parental Rights

*For special procedures applicable to cases involving Indian children, see Section 20.13.

A parent may voluntarily consent to termination of his or her parental rights* without the court announcing a statutory basis for termination. *In re Toler,* 193 Mich App 474, 477 (1992). Note, however, that in child protective proceedings, *jurisdiction* cannot be conferred on the Family Division by consent of the parties. *In re Youmans,* 156 Mich App 679, 684 (1986). A voluntary release of parental rights for purposes of adoption must comply with the Adoption Code. See *In re Buckingham,* 141 Mich App 828, 834–37 (1985), and Warner, *Adoption Proceedings Benchbook* (MJI, 2003), Chapter 2.

18.15 Termination of One Parent's Rights Under the Juvenile Code

The Michigan Court Rules and MCL 712A.19b allow for the termination of the parental rights of one of two parents. See MCR 3.977 ("respondent" is used in singular throughout rule) and MCR 3.977(B)(1)–(2) ("respondent" defined as the natural or adoptive mother "and/or" the father of the child), and *In re Marin,* 198 Mich App 560, 566 (1993) (use of singular "parent" in

§19b(1) indicates legislative intent to allow termination of one parent's rights). If the rights of one parent are terminated, the other parent *may be* entitled to custody of the child.

For cases involving termination of one parent's rights, see the following:

- *In re Arntz,* 418 Mich 941 (1984) (father's parental rights were reinstated by the Michigan Supreme Court after the trial court terminated both parents' rights for respondent-mother's failure to visit the respondents' children, who were placed with paternal grandparents);
- *In re Campbell,* 129 Mich App 780, 784–85 (1983) (where respondent-mother's parental rights were terminated because of neglect, the trial court properly dismissed that portion of the petition pertaining to the child's noncustodial father, as the father, if he continued to participate in treatment, would be able to provide proper care for child);
- *In re Emmons,* 165 Mich App 701 (1988) (children were properly placed with their noncustodial parent following the termination of their custodial parent's rights on grounds of sexual abuse);
- *In re SR,* 229 Mich App 310, 316–17 (1998) (respondent-father's rights were properly terminated after he was convicted of attempting to murder his daughter and commit suicide, even though following conviction and before termination proceedings were initiated the child was in the custody of the non-offending parent and the offending parent was in prison); and
- *In re Huisman,* 230 Mich App 372, 382 (1998) (where the child's father and step-mother unsuccessfully attempted to terminate respondent-mother's parental rights under the "step-parent adoption" provisions of the Adoption Code, respondent-mother's rights were properly terminated under the Juvenile Code pursuant to a petition filed by the father and step-mother, and placement of the child with the father and step-mother was proper).

18.16 Effects of Termination of Parental Rights

Parental rights to a child include the rights to custody, control, services, earnings, and inheritance. See MCL 722.2 and MCL 722.2103(b). If all parental rights to a child are terminated, the child will be placed in the permanent custody of the court. MCL 712A.19b(1). If the court terminates parental rights, the court must order that additional efforts for the reunification of the child with the respondent-parent will not be made. MCL

712A.19b(5). The court may then commit the child to the Michigan Children's Institute of the FIA for adoptive planning, supervision, care, and placement. See MCL 400.203(a)(*i*) and SCAO Form JC 63. MCL 400.204(1) states in part:

> "(1) Within 30 days after an order is made committing a child to the superintendent of the Michigan children's institute, the court shall send to the superintendent a certified copy of the petition, the order of disposition in the case, and the report of the physician who examined the child. Upon receipt of the order the superintendent of the Michigan children's institute shall notify the court of the child's placement so that the court may cause the child to be transported to that placement. . . ."

*See Section 12.13 for the procedural requirements.

Reinstatement of parental rights following rehearing. Parental rights may be reinstated by a supplemental order of disposition entered after rehearing pursuant to MCL 712A.21(1). The petition for rehearing must be filed not later than 20 days after the date of entry of the order terminating parental rights. *Id.**

Child support obligations. In *Evink v Evink,* 214 Mich App 172, 174 (1995), a father voluntarily released his parental rights to his child after a petition alleging child abuse was filed. The mother and father subsequently divorced, and the father was ordered to pay child support. The child remained in the mother's custody. The Court of Appeals held that termination of the father's parental rights did not extinguish his obligation to pay child support. In *Sturak v Ozomaro,* 238 Mich App 549, 566 (1999), citing *Evink, supra,* the Court of Appeals stated that "[o]nly a child's adoption relieves the natural parents from their obligation to support the child."

18.17 An Overview and History of §19b(3) of the Juvenile Code

Several of the cases cited in Sections 18.18–18.31, below, were decided under the statute governing termination of parental rights prior to its extensive revision in 1988. See 1988 PA 224, which added §19b to the Juvenile Code, effective April 1, 1989. Prior to 1988 PA 224, the grounds for termination of parental rights were contained in §19a of the Juvenile Code.

Since 1988, the number of statutory grounds for termination of parental rights under the Juvenile Code has increased from 6 to 14. See the following:

- 1990 PA 314, §1, added subsections (3)(d), (e), and (f), which provide for three different grounds for termination of parental rights after the appointment of a limited or "full" guardian.

- 1994 PA 264, §1, added subsection (3)(j), which provides for termination of parental rights if there is a reasonable likelihood that the child will be harmed if he or she is returned to a parent.

- 1997 PA 169 added subsections (3)(k), (l), and (m), which provide for termination of parental rights based upon a parent's prior abuse of another child, or upon a parent's prior voluntary or involuntary termination of parental rights to another child.

- 1998 PA 530 added subsection (3)(n), which provides for termination of parental rights based upon a parent's conviction of a serious criminal offense. 1998 PA 530 also added subsection (3)(b)(*iii*), which provides for termination of parental rights when a child or sibling of the child has suffered a physical injury or sexual abuse caused by a nonparent adult.

- 2000 PA 46 added subsections (3)(k)(*vii*) and (*viii*), which provide for termination of parental rights based on the voluntary manslaughter of a child or sibling, or aiding and abetting, attempting, conspiring, or soliciting the murder or voluntary manslaughter of a child or sibling.

- 2000 PA 232, §1, added subsection (3)(a)(*iii*), which provides for termination of parental rights where a parent voluntarily surrenders a newborn under the Safe Delivery of Newborns Law, MCL 712.1 et seq., and does not request custody within 28 days of surrendering the child.

Cases decided under older versions of the statute governing termination of parental rights may still be useful for guidance in a particular case. Therefore, they are provided below along with quotations of the statutory language that existed at the time the cases were decided. Relevant statutory history is also provided in margin notes.

It should also be noted that termination of parental rights is rarely sought under a single statutory provision. This is partly because several of the statutory provisions overlap or cover the same conduct or condition. For example, a parent who deserts or abandons a child may have his or her rights terminated under §19b(3)(a) (desertion), §19b(3)(c) (failure to rectify condition leading to the taking of jurisdiction), §19b(3)(g) (neglect), and §19b(3)(j) (reasonable likelihood of harm to child if returned home). Other combinations are also possible. In the case summaries below, when parental rights were terminated under more than one statutory provision, it may be noted.

MCL 712A.19b(3) currently provides that the court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that one or more of the following statutory criteria, discussed in Sections 18.18–18.31, are fulfilled.

18.18 Termination on the Grounds of Desertion–§19b(3)(a)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child has been deserted under any of the following circumstances:

> "(*i*) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
>
> "(*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
>
> "(*iii*) The child's parent voluntarily surrendered the child to an emergency service provider under chapter XII and did not petition the court to regain custody within 28 days after surrendering the child."

Petition Requirements

A petition based on subsection (3)(a)(*i*) should include:

- the date that the child was deserted and the number of days that have passed since that date;
- the circumstances under which the child was deserted; and
- the facts that support the finding that reasonable but unsuccessful efforts have been made to locate and identify the parents and that at least 28 days have passed since the child was deserted.

A petition based on subsection (3)(a)(*ii*) should include:

- the date that the child was deserted and the number of days that have passed since that date;
- the circumstances under which the child was deserted;

- the names of the parents; and
- the facts that support the finding that the parents have not sought custody of the child for at least 91 days following the parents' desertion of the child.

A petition based on subsection (3)(a)(*iii*) should include:

- the date that the child was surrendered to an emergency service provider and the number of days that have passed since that date;
- the circumstances under which the child was surrendered; and
- the facts that support the finding that at least 28 days have passed since the child was surrendered, and that the parent did not petition the court to regain custody of the child within 28 days after surrendering the child.

Case Law

The following cases construe §19b(3)(a)(*ii*) (identified parent has deserted child for 91 days or more and has not sought custody):

- *In re TM (After Remand),* 245 Mich App 181, 193–94 (2001)

Where respondent-mother had no contact with and made no effort to obtain custody of her child for more than two years preceeding trial, termination of her rights was proper under §19b(3)(a)(*ii*) despite respondent-mother's efforts to obtain custody of her child years earlier.

- *In re Hall,* 188 Mich App 217, 223–24 (1991)*

Where respondent-mother had "little or no contact" with her children after they were placed with their grandmother, the evidence was sufficient for termination under §19b(3)(a)(*ii*).

- *In re Mayfield,* 198 Mich App 226, 230, 235 (1993)*

Where the respondent-noncustodial parent failed to appear at hearings, failed to provide support, and had not seen his son for over two years, there was clear and convincing evidence supporting termination under §19b(3)(a)(*ii*).

*Termination in both *Hall* and *Mayfield* was also granted because of respondents' failure to provide proper care or custody (neglect). See §19b(3)(g), discussed at Section 18.24, below.

Prior case law. Prior to the enactment of 1988 PA 224, the predecessor to current §19b(3)(a) stated that termination was proper upon a finding that:

> "(b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of another person without provision for his support or without communication for a period of at least 6 months.

> The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian." MCL 712A.19a(b) (repealed as of April 1, 1989).

For cases interpreting this section, see the following:

- *In re Sterling,* 162 Mich App 328, 336 (1987) (where unrefuted evidence established that respondent failed to support and had no contact with her children during the six months prior to the termination hearing, termination was proper);
- *In re Sears,* 150 Mich App 555, 561 (1986) (respondent's failure to support or communicate with her children, who were placed with a temporary guardian, for three years prior to termination hearing constituted presumptive evidence of desertion and abandonment); and
- *In re Schejbal,* 131 Mich App 833, 837 (1984) (termination was proper where the children were abandoned after they were placed in foster care).

18.19 Termination on the Grounds of Physical Injury or Sexual Abuse–§19b(3)(b)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:

> "(*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> "(*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

> "(*iii*) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home."

Petition Requirements

A petition based on subsection (3)(b)(*i*) should include:

- a description of the respondent-parent's acts that caused the child's injuries or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse; and
- the facts that support a finding that the child will suffer further injury or abuse if returned to the care of the respondent-parent.

A petition based on subsection (3)(b)(*ii*) should include:

- the name of the parent who caused the child's injury or abuse;
- a description of the acts that caused the injury or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse;
- a description of how the respondent-parent had the opportunity to prevent the injury or abuse and failed to do so; and
- the facts that support a finding that the child will suffer further injury or abuse if returned to the home of the respondent-parent.

A petition based on subsection (3)(b)(*iii*) should include:

- the name of the nonparent adult* who caused the child's injury or abuse;
- a description of the acts that caused the injury or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse; and

*See Section 4.3 for the definition of "nonparent adult."

- the facts that support a finding that the child will suffer further injury or abuse by the nonparent adult if returned to the home of the respondent-parent.

Note: The current §19b(3)(b)(*ii*) requires proof of an "opportunity to prevent" the injury or abuse and a failure to do so. It is unclear whether this subsection requires proof of an intentional omission. See *In re Farley,* 437 Mich 992 (1991) (Levin, J, would have granted leave to appeal on the issue of whether the respondent-mother, who was diagnosed as suffering from "battered wife syndrome," could have prevented abuse of her children).

Note: Subsection (3)(b)(*iii*) differs from subsection (3)(b)(*ii*) in that it does *not* require that the parent failed to prevent the injury or abuse, but only requires that the injury or abuse was caused by a nonparent adult and that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

Case Law

The following cases construe §19b(3)(b)(*i*) (physical injury or physical or sexual abuse of a child or child's sibling by a parent) and and (*ii*) (failure to prevent physical injury or physical or sexual abuse):

- *In re Sours,* 459 Mich 624, 632–36 (1999)

Respondents were unmarried and had six children, one of whom was born during the trial court proceedings in this case. When the father assaulted the mother, their oldest son intervened, and the father struck him. The mother reported the assault to police but failed to cooperate with the prosecuting attorney. Approximately one year later, the mother and father separated. Respondent-mother later began a relationship with a man who pled guilty to assaulting her. The Michigan Supreme Court found that the evidence was insufficient to uphold termination of the mother's rights under MCL 712A.19b(3)(b)(*ii*). The Court concluded that there was no "reasonable likelihood" that a child would suffer injury or abuse if placed in the mother's home because the mother and father had ended their relationship approximately 18 months prior to the termination hearing. Although the mother's new boyfriend was abusive, no children were present when his assault of the mother occurred, the boyfriend did not have a history of abusive behavior, and he was attending violence counseling.

- *In re Vasquez,* 199 Mich App 44, 51–52 (1993)*

*Rights were also terminated under §19b(3)(a)(*ii*) (desertion), §19b(3)(c)(*i*) (failure to rectify condition leading to jurisdiction), §19b(3)(g) (neglect), §19b(3)(h) (imprisonment), and §19b(3)(i) (termination of rights to siblings).

Testimony at trial indicated that respondent-father had sexually abused his daughter from the age of three, fractured his daughter's arm, fractured his son's skull with a blunt object, and that he had locked his twin daughters in a closet for approximately 12 hours without food or water to conceal them from investigators. The Court of Appeals upheld the termination of respondent-father's rights under §19b(3)(b)(*i*).

- *In re Powers,* 208 Mich App 582, 588–91 (1995)*

*Rights were terminated, however, under §19b(3)(c)(*i*) (failure to rectify condition leading to jurisdiction) and §19b(3)(g) (neglect).

Respondent was the live-in boyfriend of the mother of a boy who had been removed from the mother's care in a prior proceeding due to her inability to protect the boy from respondent's physical abuse. Respondent was not the boy's father and was not a party to the prior proceedings. A petition was filed seeking termination of respondent's parental rights to a daughter who was subsequently born to respondent and the mother, on grounds of "anticipatory abuse or neglect." Respondent argued, and the Court of Appeals agreed, that respondent's parental rights to his daughter could not be terminated under §19b(3)(b)(*i*) because that statutory subsection requires that the respondent must be the "parent" of the previously abused child.

> **Note:** See, however, §19b(3)(b)(*iii*), discussed above, which allows for termination even when the prior abuse was by a nonparent adult.

Prior case law: The following cases were decided under §19a(e) ("unable to provide a fit home for the child by reason of neglect") of the termination statute prior to its amendment in 1988. In these cases, the Court of Appeals broadly interpreted former §19a(e) to include situations where one parent allowed the other parent to behave in a manner that created an unfit home environment for their children. The Juvenile Code was then amended by 1988 PA 224 to add §19b(3)(b). This amendment, therefore, did not create new grounds for termination but merely added to the statute some grounds that had already been created by case law.

- *In re Miller,* 182 Mich App 70, 74, 82 (1990) (the Court of Appeals upheld termination of respondent-mother's parental rights, where respondent father physically abused their children, locked them in their rooms for extended periods, and failed to seek needed medical treatment. Although respondent-mother

reported the incidents of physical abuse to authorities, the Court found that she permitted the continuance of an abusive and neglectful environment and returned home with the children after being in an assault crisis center. Psychological evaluations indicated that respondent-mother refused to "stand up" to respondent-father and placed her own needs before those of the children);

- *In re Parshall,* 159 Mich App 683, 690 (1987) (the respondent-father was a "passive-aggressive/dependent" person who allowed his "angry/anti-social" wife to cause death and serious injuries to two of their children);

- *In re Sprite,* 155 Mich App 531, 536 (1986) (mother's parental rights properly terminated where she offered little or no support to her daughters and allowed father to continue seeing them after she learned that father had sexually abused them);

- *In re Brown,* 149 Mich App 529, 541, 543–44 (1986) (the respondent-mother was "unable to provide a fit home by reason of neglect" because she allowed a man known to sexually molest children to be with her children; however, respondent's parental rights were improperly terminated because respondent was not personally served with the petition for jurisdiction and a notice of the time and place of the hearing); and

- *In re Rinesmith,* 144 Mich App 475, 483–84 (1985) (mother's parental rights terminated for failing to protect children from physical and sexual abuse by the father).

18.20 Termination on the Grounds of Failure to Rectify Conditions Following the Court's Assumption of Jurisdiction–§19b(3)(c)

The court may terminate a parent's parental rights if it finds that the parent was a respondent in a proceeding brought under the Juvenile Code, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

> "(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> "(*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the

> parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."

Petition Requirements

A petition based on subsection (3)(c)(*i*) should include:

- the date that the dispositional order was issued and the number of days (at least 182) that have passed since that date;
- a description of the conditions that led to the respondent's adjudication; and
- the facts that support the finding that these conditions continue to exist and there is no reasonable likelihood that these conditions will be rectified within a reasonable time considering the child's age.

A petition based on subsection (3)(c)(*ii*) should include:

- the date that the dispositional order was issued and the number of days (at least 182) that have passed since that date;
- a description of the conditions that led to the respondent's adjudication;
- a description of the additional conditions that now exist that cause the child to come within the court's jurisdiction;
- a description of the notice and opportunity for a hearing that has been given to respondent regarding these additional conditions; and
- the facts that support the finding that the respondent has been given a reasonable opportunity to rectify these additional conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Case Law

The following cases were decided under §19b(3)(c):

- *In re JK,* 468 Mich 202, 211–13 (2003)

The Michigan Supreme Court reversed the decision of the trial court to terminate the respondent-mother's parental rights pursuant to MCL

712A.19b(3)(c)(*ii*). The "other condition" that the lower court relied upon was the lack of bonding or attachment between the mother and the child that arose after the child was placed in foster care. At the hearing on termination of parental rights, respondent-mother's therapist testified that mother and child had appropriately bonded and were attached. However, another therapist, who met with respondent-mother and child for less than one hour, testified that respondent-mother and child were not well bonded or attached, but that this may have resulted from the child's placement in foster care. The Supreme Court stated the following:

> "In concluding that the respondent and her child were not properly bonded, the trial court ignored the fact that, immediately after the agency filed the petition for termination of parental rights, visitation was automatically suspended for several months pursuant to MCL 712A.19b(4). The counselor was then notified only two months before trial to address the bonding and attachment issue with the respondent. Any suggestion that the respondent was given 'a reasonable opportunity' to rectify the alleged bonding and attachment issue is unwarranted. . . .
>
> "The fundamental right of a parent and child to maintain the family relationship can be overcome only by clear and convincing evidence, which, in this case, was not supplied by this single witness who observed the mother and child together for just one hour at a time when she had been addressing the bonding and attachment issue in therapy for less than one month." *JK, supra* at 212–13. [Footnote omitted.]

- *In re Trejo Minors,* 462 Mich 341, 357–60 (2000)

The Michigan Supreme Court held that there was clear and convincing evidence to establish termination of parental rights under MCL 712A.19b(3)(c)(*i*), where the respondent failed to find suitable housing for her three children and failed to establish a custodial plan for the children prior to the "best interests phase" of the termination hearing.

- *In re Sours,* 459 Mich 624, 636–41 (1999)

The original and an amended petition alleged the respondent-father's physical abuse and the respondent-mother's failure to protect the children from the father's abuse. The mother and father subsequently separated. After the court took jurisdiction over the children, a second amended petition alleged that two children had severe diaper rash, one child was malnourished, and the mother had packed insufficient clothing and provided inappropriate snacks for the children upon their removal by FIA. When the couple's sixth child was born, the FIA petitioned the court to take

jurisdiction of that child and obtained an order for his removal. When the agency worker arrived to take the child into custody, the mother attempted to conceal the child from the agency worker by hiding him under a blanket. The child was on medication and an apnea monitor was attached to him. After the removal of the sixth child, the mother failed to comply with the court's orders. The FIA petitioned for termination of the mother's parental rights, alleging violations of the first and second amended petitions.

The Michigan Supreme Court found the evidence insufficient to uphold termination under §19b(3)(c)(*i*) because the condition that led to adjudication—the father's abuse and the mother's failure to protect the children from it—did not exist 182 days or more after the initial dispositional hearing. However, the Court found sufficient evidence supported terminating the mother's rights under MCL 712A.19b(3)(c)(*ii*). The mother failed to rectify the conditions contained in the second amended petition and failed to meet the medical needs of the sixth child.

- *In re AH,* 245 Mich App 77, 87–89 (2001)

The trial court did not err in terminating respondent-mother's parental rights to her two-year-old child. The conditions that led to adjudication included respondent-mother's two arrests for domestic violence and disorderly conduct, her repeated requests for Children's Protective Services to remove her child from her home, her failure to participate in counseling, and missed visitation. During the year between initial disposition and the termination hearing, respondent did not demonstrate that she could provide adequate housing, missed roughly half of the scheduled visitations, continued an abusive relationship, and did not undergo counseling. Termination of respondent's parental rights was in the child's best interests: the child was not attached to respondent, thrived in foster care, and was "healthy, happy, and highly adoptable."

- *In re KMP,* 244 Mich App 111, 118–19 (2000)

Where respondent-mother failed to provide numerous drug screens, had a continuing pattern of missing drug treatment therapy sessions, and relapsed while her children were under the court's jurisdiction, and where two years elapsed between the filing of the supplemental petition and the termination hearing, the court properly terminated respondent-mother's parental rights under §19b(3)(c)(*i*).

- *In re Conley,* 216 Mich App 41, 43–45 (1996)*

The trial court properly terminated respondent-mother's parental rights, where her alcoholism left her unable to care for her two sons, one of whom suffered from fetal alcohol syndrome. Although she attended (but did not complete) inpatient treatment programs and participated in counseling, respondent-mother continued to drink while her children were under the court's jurisdiction.

*Rights were also terminated under §19b(3)(g) (failure to provide proper care and custody).

*Termination was also upheld because of respondent's failure to provide proper care or custody. See §19b(3)(g), discussed at Section 18.24, below.

- *In re McIntyre,* 192 Mich App 47, 50–52 (1991)*

The Court of Appeals held that the trial court did not err in terminating respondent-mother's parental rights, where the court took jurisdiction because of respondent's extended incarceration, and where the caseworker determined that respondent's planned placement of the child with a relative was inappropriate. Termination was proper even though the relative expended considerable effort to plan for custody of the child.

- *In re Newman,* 189 Mich App 61, 65–71 (1991)

The Court of Appeals held that the probate court erred in terminating respondents' parental rights to their five children because respondents were never given adequate instruction by the Department of Social Services (DSS, now the Family Independence Agency) on how to maintain a clean home, and because respondents were never given adequate instruction by the DSS on how to supervise one of their five children, who had severe behavioral problems that resulted in injuries to respondents' other four children.

- *In re Dahms,* 187 Mich App 644, 647 (1991)

Where expert testimony suggested that respondent-mother had a "fair" chance of becoming capable of raising her three children, who were aged three years to five years, after two to three years of therapy, the trial court did not err in terminating her parental rights. There was clear and convincing evidence of abuse and neglect, and the two-to-three-year period was unreasonable given the ages and "pervasive behavior disorders" of the children. Two of the children "would frequently act like wild dogs," one showed signs of impaired socialization, and one showed signs of sexual abuse.

Prior case law: The following cases were decided under the former MCL 712A.19a(f), which allowed for termination of parental rights where:

> "The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months."

- *In re Miller,* 433 Mich 331, 338, 343–44 (1989) (despite respondent's record of steady employment, financial support of his son, acceptable compliance with the trial court's orders, and lack of support from the child's mother and respondent's own parents, termination was proper. There was clear and convincing evidence of respondent's inappropriate physical discipline, unresolved abuse of alcohol, assaultive behavior, and lack of

visitation. Nor did the trial court place undue emphasis on an incident in which respondent smeared feces on his son's face following a toilet-training accident);

- *In re Pasco,* 150 Mich App 816, 820–22 (1986) (the trial court properly found that respondent-mother failed to reestablish a proper home by moving repeatedly and failing to improve parenting skills, where there was clear and convincing evidence of physical and emotional neglect);

- *In re Mason,* 140 Mich App 734, 737 (1985) (failure to comply with a court-ordered treatment plan does not, by itself, justify termination of parental rights. There must also be clear and convincing evidence that one or more of the statutory criteria have been met. In *Mason,* the trial court erroneously terminated respondent-mother's parental rights even though she failed to attend parenting classes and visitation appointments and made minimal progress in counseling);

- *In re Ovalle,* 140 Mich App 79, 83–84 (1985) (where the children were in foster care for 930 days after three separate removals from the home, respondent-mother repeatedly disobeyed court orders and failed to kick her drug habit, and respondent-father was sentenced to 7-20 years for criminal sexual conduct, the trial court did not err in terminating both parents' parental rights);

- *In re Moore,* 134 Mich App 586, 598 (1984) (despite respondent-mother's repeated moves, "emotional weakness," conviction for prostitution, documented emotional problems, her children's 22-month stay in foster care, and the recent addition of a newborn, the trial court erred in terminating her parental rights); and

- *In re Boughan,* 127 Mich App 357, 364 (1983) (the petition alleged sufficient facts to support termination of parental rights, where respondent-mother, for more than two years, made "no substantial progress" in caring for the physical and medical needs of her son).

18.21 Termination on the Grounds of Substantial Failure to Comply With Limited Guardianship Placement Plan–§19b(3)(d)

*§§19b(3)(d)-(f) became effective December 2, 1990. See 1990 PA 314, §1. There have been no reported cases decided under these statutory sections.

"(d) The child's parent has placed the child in a limited guardianship under . . . MCL 700.5205[] and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in . . . MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."*

Petition Requirements

A petition based on subsection (3)(d) should include:

- a copy of the limited guardianship placement plan entered into by respondent, and
- the facts that support the finding that the respondent has substantially failed, without good cause, to comply with the limited guardianship placement plan to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.*

*See Section 4.12 for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent fails to comply with a limited guardianship placement plan.

18.22 Termination on the Grounds of Substantial Failure to Comply With Court-Structured Guardianship Placement Plan–§19b(3)(e)

"(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in . . . MCL 700.5207 and 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."

Petition Requirements*

A petition based on subsection (3)(e) should include:

- a copy of the court-structured guardianship plan ordered by the court, and
- the facts that support the finding that respondent has substantially failed, without good cause, to comply with the court-structured guardianship plan to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.

*See Section 4.12 for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent fails to comply with a court-structured guardianship placement plan.

18.23 Termination on the Grounds of Parent's Failure to Support, Visit, Contact, and Communicate With Child Who Has Guardian–§19b(3)(f)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child has a guardian under the Estates and Protected Individuals Code and both of the following are true:

> "(*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> "(*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition."

Petition Requirements*

A petition based on subsection (3)(f) should include:

- a copy of the limited guardianship placement plan entered into by respondent or of the court-structured guardianship plan ordered by the court;
- the facts that support the finding that respondent had the ability to assist in the support of the child and has failed, without good cause, to provide regular and substantial support to the child for two years or more before the filing of the petition for termination; and
- the facts that support the finding that respondent had the ability to visit, contact, or communicate with the child and has failed, without good cause, to do so for a period of two years or more before the filing of the petition for termination.

*See Section 4.12 for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent has failed to support and contact a child who has a guardian.

18.24 Termination on the Grounds of Failure to Provide Proper Care or Custody–§19b(3)(g)

"(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."*

*In 1988, when §19b was added to the Juvenile Code, this statutory ground for termination was designated as §19b(3)(d). In 1990, after subsections (3)(d)–(f) were added, this subsection became renumbered as §19b(3)(g).

Petition Requirements

A petition based on subsection (3)(g) should include:

- the facts that support the finding that respondent, without regard to intent, has failed to provide proper care or custody for the child, and
- the facts that support the finding that there is no reasonable likelihood that respondent will be able to provide proper care and custody within a reasonable time considering the child's age.

Case Law

The following cases construe §19b(3)(g):

- *In re JK,* 468 Mich 202, 213–14 (2003)

Where the respondent-mother fulfilled every requirement of the parent-agency agreement, termination of her parental rights pursuant to MCL 712A.19b(3)(g) was improper.

- *In re Trejo Minors,* 462 Mich 341, 360–62 (2000)

Respondent-mother's rights were properly terminated, where she failed to obtain adequate housing for her three children and failed to progress in therapy.

- *In re Terry,* 240 Mich App 14, 21–23 (2000)*

*Rights were also terminated under §19b(3)(c)(*i*) (failure to rectify conditions leading to court's jurisdiction).

Where respondent-mother met "many, if not all," of the treatment plan goals, but where witnesses testified that respondent-mother's developmental disabilities would demand that she be provided daily assistance in raising her two children, and that it would take her two to three years to obtain basic parenting skills, the trial court did not err in terminating her parental rights.

- *In re Boursaw,* 239 Mich App 161, 168–78 (1998), overruled on other grounds 462 Mich 341, 353–54 (2000)

The trial court clearly erred in terminating respondent-mother's parental rights to her daughter, where the psychologist testified at the termination

hearing that respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months. The psychologist testified that it would take two to three years before he would be confident that respondent's behavioral changes would endure, not that it would take two to three years before respondent could attempt to parent her child on a daily basis. Respondent demonstrated "proper motivation" by making significant strides in meeting the goals established by the court at the sole review hearing. The Court of Appeals also distinguished *In re Dahms,* 187 Mich App 644 (1991), where the Court of Appeals found termination proper because the two to three years of therapy for the respondent was unreasonable considering the children's ages and "pervasive behavioral disorders" caused by the respondent's neglect. The child in *Boursaw* did not suffer from similar problems.

- *In re IEM,* 233 Mich App 438, 450–54 (1999)*

**IEM* involved an Indian child. For the special requirements for termination of parental rights to Indian children, see Sections 20.11–20.13.

Termination of the respondent-mother's parental rights was proper, where evidence showed that due to emotional and cognitive problems, respondent would be unable to be an effective parent no matter how well she was assisted.

- *In re Huisman,* 230 Mich App 372, 384–85 (1998)

Respondent-mother's parental rights were properly terminated, where she attempted to murder her child to prevent visitation with the noncustodial parent, respondent was serving an 8-25 year sentence for this, and the evidence showed that respondent's serious emotional problems would continue to exist in the future.

- *In re Hamlet (After Remand),* 225 Mich App 505, 515–17 (1997)

The Court of Appeals upheld the trial court's order terminating the respondent-father's parental rights. Respondent was incarcerated for most of the lives of his two children, and expert witnesses testified to his poor parenting skills, his lack of cooperation in court-ordered counseling to improve those skills, and his inability to improve those skills within a reasonable time.

- *In re Jackson,* 199 Mich App 22, 25–28 (1993)*

*In *Jackson and King,* rights were also terminated under §19b(3)(c)(*i*). See Section 18.20, above.

Where respondent was diagnosed as a paranoid schizophrenic and repeatedly left the children alone in the home, termination of her parental rights was proper.

- *In re King,* 186 Mich App 458, 462–64 (1990)*

Termination of respondent-mother's parental rights was proper, where her apartment was littered with trash and feces, she was repeatedly evicted from

other apartments, and where she left the children unattended for extended periods and neglected their physical needs.

- *In re Systma,* 197 Mich App 453, 457 (1992)

Termination of respondent-father's parental rights was proper, where he had not kept in contact with his child since he and the child's mother divorced, he had a drinking problem and an extensive criminal record, and where he was released from prison but reoffended within two weeks and would therefore be incarcerated for at least another year.

- *In re Perry,* 193 Mich App 648, 649–51 (1992)

Respondent-father was convicted of raping one of his children and sentenced to three-and-a-half to five years in prison. On the basis of this prison sentence, the Department of Social Services (DSS, now the Family Independence Agency) petitioned to terminate respondent's parental rights. At the time of the termination hearing, respondent had served enough time so that he would be eligible for parole in less than two years. The Court of Appeals, quoting *In re Neal,* 163 Mich App 522, 527 (1987), stated that the proper determination under what is now §19b(3)(h) is "'whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home.'" However, the Court of Appeals noted that the DSS could have petitioned for termination of respondent's parental rights under §19b(3)(g) (improper care or custody) because that subsection does not have the same two-year requirement that is contained in §19b(3)(h). The Court of Appeals concluded, therefore, that it was harmless error to terminate respondent's rights under §19b(3)(h) because those parental rights clearly could have been terminated under §19b(3)(g).

> **Note:** *In re Perry* and *In re Systma* demonstrate the interrelationship between subsections (3)(g) (improper care or custody) and (3)(h) (imprisonment of respondent-parent). A failure to provide proper care or custody can be caused by imprisonment. Therefore, because subsection (3)(g) does not contain the two-year time requirement of subsection (3)(h), subsection (3)(g) will, in most cases, be easier to establish than subsection (3)(h). See *Perry, supra* at 650.

Prior case law: The following cases were decided under the former MCL 712A.19a(e), which allowed for termination of parental rights where the "parent or guardian is unable to provide a fit home for the child by reason of neglect."

General Neglect

- *In re Schmeltzer,* 175 Mich App 666, 675–79 (1989) (where the respondents' child failed to thrive while in respondents' care for

only four months and there was evidence of physical abuse, termination was proper);

- *In re Campbell,* 170 Mich App 243, 253–55 (1988) (where respondent was repeatedly institutionalized and her children were physically and sexually abused, termination was proper);

- *In re Webster,* 170 Mich App 100, 109–10 (1988) (where respondents' child was living in a home amid animal and other filth, with inadequate sleeping arrangements, and was malnourished, and where respondents exhibited "bizarre ideation and behavior," termination was proper);

- *In re Kellogg,* 157 Mich App 148, 150–58 (1987) (where respondent's emotional neglect of children was due to respondent's depression, evidence was insufficient for termination under subsection 19a(e) (neglect), but the case was remanded for consideration under subsection 19a(c) (neglect due to mental illness));

- *In re Youmans,* 156 Mich App 679, 688–90 (1986) (respondents' neglect of special medical needs of one child justified termination of parental rights to that child);

- *In re Riffe,* 147 Mich App 658, 670–73 (1985) (where respondent's child was diagnosed with a "failure to thrive," and where child's parents engaged in fistfight in home, termination was proper); and

- *In re Adrianson,* 105 Mich App 300, 315–18 (1981) (where testimony established her children's need for stability and the necessity of long-term treatment for respondent-mother, termination was proper).

Drug Abuse Causing Neglect

- *In re Shawboose,* 175 Mich App 637, 641 (1989) (where respondent's alcoholism and disinclination to correct the problem caused the neglect of her children, termination was proper);

- *In re Sterling,* 162 Mich App 328, 336–41 (1987) (evidence of respondent's drug addiction and failure to support or communicate with her children supported termination);

- *In re Andeson,* 155 Mich App 615, 621–22 (1986) (where respondent-father was "abusive, obnoxious, and belligerent" when using alcohol and was implicated in a sibling's death, termination was proper); and

- *In re Dupras,* 140 Mich App 171, 174–75 (1984) (where there was long-term alcohol abuse by both parents, termination of

respondent-father's parental rights was proper for failure to remedy neglect resulting from mother's more profound alcohol abuse).

Preference for One Child Resulting in Neglect of Another Child

- *In re Kantola,* 139 Mich App 23, 27–29 (1984) (where respondents abused their female children, termination of parental rights to those children was proper even though a male child had previously been returned home from foster care);
- *In re Bell,* 138 Mich App 184, 186 (1984) (termination was proper where evidence showed the respondents' neglect of their younger child and a marked preference for their older child); and
- *In re Franzel,* 24 Mich App 371, 374–75 (1970) (termination was proper where respondents showed preference for older child).

Under the former MCL 712A.19a(c), parental rights could be terminated where "[a] parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child." The current statute, §19b(3)(g), has fewer requirements than former §19a(c). For example, the current statute does not require that the lack of proper care or custody must last at least two years, or that this lack of care or custody must be caused by mental deficiency or mental illness. For cases interpreting the former statutory provision, see the following.

Neglect Due to Mental Deficiency or Mental Illness

- *In re Banas,* 174 Mich App 525 (1988) (where respondent was plagued by an unspecified mental illness, termination was proper under either subsection 19a(c) (mental illness) or 19a(e) (neglect));
- *In re Gass,* 173 Mich App 444, 447–52 (1988) (where respondent suffered from a mental deficiency and a severe seizure disorder that severely limited her ability to care for her child, termination was proper);
- *In re Springer,* 172 Mich App 466, 474 (1988) (where respondent's mental illness contributed to the starvation deaths of two of the children's siblings, termination of parental rights to the children was proper);
- *In re Spratt,* 170 Mich App 719 (1988) (termination was proper where respondent's paranoid schizophrenia or manic depressive disorder rendered her unable to assume the care and custody of her son within a reasonable time);

- *In re Smebak,* 160 Mich App 122, 128–29 (1987) (where respondent was institutionalized as "paranoid psychotic" with a poor prognosis, termination was proper);

- *In re McCombs,* 160 Mich App 621, 627–29 (1987) (where respondent suffered from severe mental deficiency and mental illness that required her to obtain assistance to care for her own needs, termination of parental rights to her baby was proper);

- *In re Kreft,* 148 Mich App 682 (1986) (where respondent suffered from a long-term mental illness that caused delusions, and where respondent and her child lived in unsanitary conditions, termination was proper under the heightened standards required by the federal Indian Child Welfare Act);

- *In re Brown,* 139 Mich App 17, 21–22 (1984) (where respondent's psychotic episodes resulted in physical abuse of the child, termination of parental rights was proper);

- *In re Bailey,* 125 Mich App 522, 527–29 (1983) (where both respondent-parents and their child had mental deficiencies and physical defects, termination under subsection 19a(c) was proper, as respondent-parents would be unable to attend to the child's special needs; termination of parental rights for neglect was improper, though it was held to be harmless error); and

- *In re Atkins,* 112 Mich App 528, 533–39 (1982) (respondent's extended history of depression and drug abuse supported a finding that she would be unable to provide proper care and custody within the requisite time period).

18.25 Termination on the Grounds of Imprisonment of the Parent–§19b(3)(h)

"(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

Petition Requirements

A petition based on subsection (3)(h) should include:

- the facts that support a finding that respondent will be imprisoned for a period exceeding two years after the hearing on the petition to terminate parental rights;

- the facts that support the finding that respondent has not provided for the child's proper care and custody; and

- the facts that support the finding that there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child's age.

Note: The last two elements of subsection (3)(h) are identical to the only two elements of subsection (3)(g). See Section 18.24, above. Thus, if these last elements are satisfied but the first is not, termination is nevertheless proper under subsection (3)(g).

Case Law

The following case shows the relationship between §19b(3)(g) (neglect) and §19b(3)(h):

- *In re Perry,* 193 Mich App 648, 649–51 (1992)

Respondent-father was convicted of raping one of his children and sentenced to three-and-a-half to five years in prison. On the basis of this prison sentence, the Department of Social Services (now the Family Independence Agency) petitioned to terminate respondent's parental rights. At the time of the termination hearing, respondent had served enough time so that he would be eligible for parole in less than two years. The Court of Appeals, quoting *In re Neal,* 163 Mich App 522, 527 (1987), stated that the proper determination under what is now §19b(3)(h) is "'whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home.'" However, the Court of Appeals noted that the DSS could have petitioned for termination of respondent's parental rights under §19b(3)(g) (improper care or custody) because that subsection does not have the same two-year requirement that is contained in §19b(3)(h). The Court of Appeals concluded, therefore, that it was harmless error to terminate respondent's rights under §19b(3)(h) because those parental rights clearly could have been terminated under §19b(3)(g).

Prior case law: The following cases were decided under the former §19a(d), which allowed for termination of parental rights where:

> "A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years."

- *In re Vernia,* 178 Mich App 280, 282 (1989) (where respondent-mother conceded that termination of her rights was proper because she was imprisoned for 10–20 years for various serious offenses, the Court of Appeals found it unnecessary to consider whether termination for neglect was proper);

- *In re Hurlbut,* 154 Mich App 417, 424 (1986) (termination of respondent's parental rights was proper, as he was serving a life sentence for first-degree murder);

- *In re Futch,* 144 Mich App 163, 168–70 (1984) (the probate court did not err in terminating respondents' parental rights to their two-year-old daughter, where respondents had been convicted of beating their older daughter to death and had been sentenced to 10 to 15 years in prison. Furthermore, the probate court did not err by failing to place the two-year-old child with relatives of respondents who had knowledge of the beatings and did nothing to stop them); and

- *In re Irving,* 134 Mich App 678, 681 (1984) (termination of parental rights was proper where respondent's child had been in the temporary custody of the court for six years, and respondent was then convicted of arson for the burning of the house in which she and her other children lived).

18.26 Termination on the Grounds of Prior Termination of Parental Rights to Siblings–§19b(3)(i)

"(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful."

Petition Requirements

A petition based on subsection (3)(i) should include:

- the facts that establish that parental rights to one or more of the child's siblings have been terminated;

- the facts that establish that the termination was due to serious and chronic neglect or physical or sexual abuse of the child's sibling(s); and

- the facts that establish that prior attempts to rehabilitate the parent(s) have been unsuccessful.

Case Law

The following case construed (in dicta) the requirements of subsection (3)(i).

- *In re Powers,* 208 Mich App 582, 588–92 (1995)

Respondent was the live-in boyfriend of the mother of a boy removed from the mother's care in a prior proceeding due to her inability to protect the boy

from respondent's physical abuse. Respondent was not the boy's father and was not a party to the prior proceedings. A petition was filed seeking termination of respondent's parental rights to a daughter who was subsequently born to respondent and the mother, on grounds of "anticipatory abuse or neglect." Respondent argued, and the Court of Appeals agreed, that respondent's parental rights to his daughter could not be terminated under §19b(3)(b)(*i*) because that statutory subsection requires that the respondent must be the "parent" of the previously abused child. However, the Court of Appeals stated (in dicta) that respondent's parental rights could be terminated under §19b(3)(i) because that statutory subsection only requires that parental rights to one or more of the child's siblings have already been terminated, and does not require that those parental rights that were terminated must have been respondent's parental rights.

> **Note:** Subsections (3)(i) and (3)(l) (discussed at Section 18.29, below) are very similar in that they both allow for termination based on prior involuntary termination of parental rights to other children. There are significant differences between these two subsections, however. Therefore, a petitioner should carefully review the petition requirements for each subsection before proceeding.

18.27 Termination on the Grounds of Reasonable Likelihood of Harm to Child–§19b(3)(j)

"(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

Petition Requirements

A petition based on subsection (3)(j) should include:

- the facts that support the finding, based on the conduct or capacity of respondent, that there is a reasonable likelihood that the child will be harmed if he or she is returned to the home of respondent.

Case Law

The following case construes §19b(3)(j):

- *In re Boursaw,* 239 Mich App 161, 168–78 (1998), overruled on other grounds 462 Mich 341, 353–54 (2000)

The trial court clearly erred in terminating respondent-mother's parental rights to her daughter, where the psychologist testified at the termination

hearing that respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months. The psychologist testified that it would take two to three years before he would be confident that respondent's behavioral changes would endure, not that it would take two to three years before respondent could attempt to parent her child on a daily basis. Respondent demonstrated "proper motivation" by making significant strides in meeting the goals established by the court at the sole review hearing. The Court of Appeals also distinguished *In re Dahms,* 187 Mich App 644 (1991), where the Court of Appeals found termination proper because the two to three years of therapy for the respondent was unreasonable considering the children's ages and "pervasive behavioral disorders" caused by the respondent's neglect. The child in *Boursaw* did not suffer from similar problems. The trial court's finding that a "reasonable likelihood" existed that the child would be harmed if returned to respondent's care was "essentially conjecture" (quoting *In re Sours,* 459 Mich 624, 636 (1999)).

18.28 Termination on the Grounds of Serious Abuse of Child or Sibling–§19b(3)(k)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent abused the child or a sibling of the child and the abuse included one or more of the following:*

*§19b(3)(k) became effective March 31, 1998. See 1997 PA 169. §19b(3)(k)(*vii*) –(*viii*) became effective March 27, 2000. See 2000 PA 46. There have been no reported cases interpreting this provision since it became effective.

> "(*i*) Abandonment of a young child.
>
> "(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> "(*iii*) Battering, torture, or other severe physical abuse.
>
> "(*iv*) Loss or serious impairment of an organ or limb.
>
> "(*v*) Life threatening injury.
>
> "(*vi*) Murder or attempted murder.
>
> "(*vii*) Voluntary manslaughter.
>
> "(*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter."

Petition Requirements

A petition based on subsection (3)(k) should include:

- the facts that support the finding that respondent abused the child or a sibling of the child, and that this abuse included one or more of the criminal acts described in subsection (3)(k).

Note: The requirements for subsection (3)(k) differ from the requirements for subsections (3)(i), (3)(l), and (3)(m), in that subsection (3)(k) does not require that parental rights must have been previously terminated to another child.

18.29 Termination on the Grounds of Prior Involuntary Termination of Parental Rights to Another Child– §19b(3)(l)

*§19b(3)(l) became effective March 31, 1998. See 1997 PA 169. There have been no reported cases interpreting this provision since it became effective.

"(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state."*

Petition Requirements

A petition based on subsection (3)(l) should include:

- the facts that support the finding that respondent's parental rights to another child were terminated under the Michigan Juvenile Code or a similar law of another state.

Note: If parental rights were terminated under the law of another state, petitioner should attach a copy of that law to the petition.

Note: Subsections (3)(i) (discussed at Section 18.26, above) and (3)(l) are very similar in that they both allow for termination based on prior involuntary termination of parental rights to other children. There are significant differences between these two subsections, however. Therefore, a petitioner should carefully review the petition requirements for each subsection before proceeding.

Note: Courts of other states have held that prior *involuntary* termination of parental rights may be used to establish current parental unfitness, even though the previous parental conduct occurred before the enactment of the statutory provisions allowing termination of rights to the current child. See *In re Guardianship of BLA and TA,* 753 A2d 770 (NJ, 2000), and *In re June S,* 704 NYS 2d 450 (2000), and cases cited therein.

18.30 Termination on the Grounds of Prior Voluntary Termination of Parental Rights to Another Child–§19b(3)(m)

"(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state."*

*§19b(3)(m) became effective March 31, 1998. See 1997 PA 169. There have been no reported cases interpreting this provision since it became effective.

Petition Requirements

A petition based on subsection (3)(m) should include:

- facts that support the finding that the respondent-parent's parental rights to another child were voluntarily terminated following the initiation of proceedings under §2(b) of the Michigan Juvenile Code or a similar law of another state.

Note: If parental rights were terminated under the law of another state, petitioner should attach a copy of that law to the petition.

18.31 Termination on the Grounds of Conviction of a Serious Offense–§19b(3)(n)

"(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:*

*§19b(3)(n) became effective July 1, 1999. See 1998 PA 530. There have been no reported cases interpreting this provision since it became effective.

(*i*) A violation of section 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.316, 750.317, 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.

(*ii*) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

(*iii*) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (*i*) or (*ii*)."

The offenses to which §19b(3)(n)(*i*) applies are:

- first-degree murder;

- second-degree murder;
- first-degree criminal sexual conduct;
- second-degree criminal sexual conduct;
- third-degree criminal sexual conduct;
- fourth-degree criminal sexual conduct; and
- assault with intent to commit criminal sexual conduct.

§19b(3)(n)(*ii*) applies if the underlying conviction contains an element of the use of force or the threat of force and subjects the defendant to the "repeat offender" provisions in MCL 769.10, MCL 769.11, or MCL 769.12.

Petition Requirements

A petition based on subsection (3)(n) should include:

- the facts that support the finding that respondent was convicted of one of the criminal offenses listed in subsection (3)(n), and
- the facts that support the finding that termination is in the child's best interests because continuing the parent-child relationship with respondent would be harmful to the child.

Note: If respondent's conviction occurred under the law of another state, or under federal law, petitioner should attach a copy of that law to the petition.